

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA07-1353

BILLY PILLOW

APPELLANT

V.

SANYO MANUFACTURING CO.,
MITSUI SUMITOMO INSURANCE
CO. and DEATH & PERMANENT
DISABILITY

APPELLEES

Opinion Delivered September 17, 2008

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. 404094]

AFFIRMED

LARRY D. VAUGHT, Judge

Appellant Billy Pillow prevailed on his workers' compensation claim to the administrative law judge, who awarded Pillow an additional two-percent impairment rating to the neck and permanent and total disability benefits. The Workers' Compensation Commission reversed the decision, finding that Pillow failed to meet his burden of proof. On appeal, Pillow contends that there is a lack of substantial evidence supporting the Commission's decision. We affirm.

On April 19, 2004, while working for appellee Sanyo Manufacturing Company, Pillow was operating a forklift when it became stuck between the loading dock and the trailer of a delivery truck. This incident was accepted as compensable, and Sanyo paid medical benefits, temporary total disability benefits, and a six-percent impairment rating to the neck. At issue is an additional impairment rating beyond the six-percent accepted and paid by Sanyo and permanent total disability/wage loss disability benefits.

At the time of the hearing, Pillow was fifty-eight years old and had a ninth-grade education. For nearly his entire thirty-eight-year tenure at Sanyo, Pillow was a forklift driver. According to Pillow, his job required him to not only drive a forklift, but also perform heavy lifting. Pillow testified that he had no physical limitations at Sanyo prior to April 19, 2004. Pillow conceded that he took prescription medication for high blood pressure, cholesterol, and diabetes prior to April 2004; however, he testified that none of these conditions limited him in any way in performing his job.

In addition to his full-time job at Sanyo, Pillow was involved in many other activities prior to April 19, 2004. For twenty years, Pillow volunteered with the Caldwell Fire Department. He devoted fifteen years volunteering for the St. Francis Sheriff's Office Search and Rescue Team. Prior to his accident, Pillow also worked as a security guard for fourteen to fifteen years for various local businesses. He testified that prior to April 19, 2004, he had no physical restrictions that limited his involvement in any of these areas. However, he testified that he had not been able to work since the April 2004 incident for the fire department, the sheriff's office, or as a security guard.

While medical records documenting his initial medical treatment are lacking, there was testimony about it. After the incident, he was taken to the emergency room and was treated by his family physician, Dr. Frank Schwartz. Pillow's primary complaints after the accident included neck and back pain, along with headaches. Pillow was thereafter seen by Dr. Banaji who treated Pillow conservatively with prescription medication for several weeks.

Due to lack of improvement, Pillow was referred to Dr. Frederick Parisoon who ordered cervical and lumbar MRIs, which were performed on May 11, 2004. Dr. Parisoon,

thereafter, recommended physical therapy, which was noted to aggravate Pillow's complaints. Pillow was next referred to Dr. Autry Parker for pain management. Dr. Parker referred Pillow for a functional-capacity evaluation. The exam took place on April 4, 2005, and the results of the exam demonstrated that Pillow gave an inconsistent, unreliable effort. Nevertheless, the evaluator concluded that Pillow demonstrated the ability to perform sedentary work.

Pillow returned to Dr. Parker in April 2005, and Dr. Parker's report summarizing that visit reflected that Pillow suffered from cervical disk herniation, lumbar degenerative disk disease, and facet arthropathy. Dr. Parker noted that Pillow was still complaining of pain and was responding to prescription medication. Dr. Parker opined that Pillow had reached maximum medical improvement. Finally, Dr. Parker concurred with the results of the FCE, which concluded that Pillow could return to sedentary work.

Pillow sought a change of physician and on June 30, 2005, was seen by Dr. Robert Abraham, a neurosurgeon. Dr. Abraham noted that Pillow was complaining of neck, back, and leg pain. He further noted that Pillow had been treated by several physicians, had multiple injections in his neck and low back with minimal relief, and participated in physical therapy with no relief. Dr. Abraham diagnosed Pillow with back and neck pain, concluded that he was not a surgical candidate, and referred him to a physiatrist.

A vocational assessment was performed May 19, 2005, by Bob White. Mr. White concluded that Pillow had no skills to offer an employer and no education. Mr. White stated that Pillow did not meet the criteria to perform sedentary or light work. Mr. White further stated, "There is no vocational issue in my opinion and I have nothing to offer Billy."

On October 11, 2005, Pillow was seen by a physiatrist, Dr. Terence Braden. Dr. Braden stated that Pillow's objective findings included a left-sided paracentral disk herniation, other findings more related to degenerative changes, and sensory neuropathy not related to his injuries. Dr. Braden concluded that Pillow had reached maximum medical improvement and could return to work without restrictions. However, Dr. Braden added, "In my experience, though, individuals such as Mr. Pillow do not return back to work and are very involved with their pain." Dr. Braden issued Pillow a six-percent impairment rating to the neck and continued Pillow on his prescription medications.

Pillow did not return to work. He testified that while his condition had improved somewhat, the neck and back pain persisted. He could only walk for short distances before he experienced pain in his back and in his leg. He could not sit for prolonged periods of time without pain. He testified that he functioned only because of prescription medications. However, he stated that when he took these medications, he was not fully able to concentrate. He testified that the "medicine keeps me so loopy and everything, they told me don't drive." He had not driven since the accident. He concluded that in light of his current condition and the side effects of his medication, he was unaware of any job he could perform. Pillow testified that he was drawing social security disability benefits¹ and had no plans to return to work.

After he was released to return to work by Dr. Braden, Pillow was informed by Sanyo that he should report to work or provide an off-work slip within five days. Pillow complied

¹Pillow was awarded social security disability benefits in October 2004.

with the latter by providing an off-work slip from Dr. Schwartz, which expired October 19, 2005. On October 21, 2005, Sanyo advised Pillow that he needed to provide another off-work slip within five days. Pillow failed to comply because Dr. Schwartz was out of town. Sanyo terminated Pillow.

On March 14, 2006, Pillow sought unauthorized medical treatment from Dr. Joseph Boals. Dr. Boals noted that Pillow's neurological exam was within normal limits and that x-rays of the neck and low back showed degenerative changes. The MRIs of the neck and back also demonstrated degenerative changes, the bone scan showed facet joint disease at the L5-S1 level, and the EMG showed evidence of a severe sensory neuropathy involving the right lower extremity suggestive of an S1 radiculopathy. Dr. Boals diagnosed Pillow with residuals from injuries to the neck and back that aggravated pre-existing arthritic changes with ongoing symptomatology. Dr. Boals issued Pillow an impairment rating of eight percent to the neck and thirteen percent to the back. He also issued significant work restrictions that precluded overhead work, work away from the body, work requiring repetitive flexion, extension or rotation of the neck, prolonged walking, standing, stooping, squatting, bending, climbing, and excessive motion in the back. Dr. Boals stated, "In my opinion he cannot return to any type of factory work. If employable it would require numerous handicap aides and a sitting job with the ability to change positions often."

On July 31, 2006, a grievance hearing regarding Pillow's termination was held and resulted in an agreement between the union and management whereby Pillow's position was reinstated. Pillow did not return to work but rather secured another off-work slip from Dr.

Schwartz. On August 7, 2006, Dr. Schwartz wrote that Pillow was still experiencing significant problems:

It is fairly obvious that he has no ability to perform any kind of task that involves lifting or prolonged standing. His management has also been complicated by severe depression following his prolonged inability to work. At this point in time, I do not think that there is any reasonable hope given his lack of improvement since the initial injury that he will ever return to work.²

Deborah, Pillow's wife of twenty-five years, testified that her husband was employed with Sanyo as a forklift driver when they married in 1981. She corroborated Pillow's testimony in several areas. She testified that Pillow had no physical limitations prior to the April 2004 injury and that since the accident, Pillow was severely restricted. She testified that "he usually lays [sic] or sits around most of the day" in pain, and that she, or her son, helps Pillow with his daily needs.

Natalie Parkman, the human-resource specialist at Sanyo, testified concerning the circumstances surrounding Pillow's termination and reinstatement. She testified that had Pillow returned to work October 12, 2005, as per Dr. Braden's release, his job would have been available and that he would have earned a higher rate of pay than he earned prior to his injury. Parkman testified that if Dr. Boals's restrictions were accurate, then Pillow would not have been a candidate for the forklift position. However, based on the full-duty work releases of Drs. Braden and Schwartz, she testified that the forklift position would have been appropriate for Pillow.

²Apparently, Dr. Schwartz gave a deposition in this case: the parties mention it in their briefs and the Administrative Law Judge and Commission mention it in their decisions. However, the deposition is not abstracted, it is not included in the addenda of the parties, and it is not in the record.

After the administrative law judge found in favor of Pillow and awarded him an additional two-percent impairment rating to the neck and permanent total disability benefits, the Commission reversed, denying all additional benefits to Pillow. Pillow argues that there is a lack of substantial evidence supporting the Commission's decision.

In *Mize v. Resource Power, Inc.*, 99 Ark. App. 415, ___ S.W.3d ___ (2007), this court set forth the well-settled standard of review for workers' compensation cases:

When reviewing a decision of the Arkansas Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms that decision if it is supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The issue is not whether this court might have reached a different result from the Commission; the Commission's decision will not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. When a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial.

Further, in workers' compensation cases, matters of credibility are exclusively within the Commission's domain. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Even where the basis of credibility is "specious at best," such a matter is for the Commission's determination. *Id.* Where there are contradictions in the evidence, the Commission is allowed to reconcile the evidence and does not have to reject the testimony nor consider a claimant's testimony as uncontroverted. *Id.* The authority of the Commission to resolve conflicting evidence also extends to medical testimony. *Id.* Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. *Id.*

The first point raised by Pillow is that there is a lack of substantial evidence supporting the Commission's decision that he was not entitled to an impairment rating in addition to the

six-percent impairment rating accepted and paid by Sanyo. Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl.2002). “Objective findings” are those that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i) (Supp. 2007). “When determining physical or anatomical impairment, neither a physician, any other medical care provider, an administrative law judge, the Workers’ Compensation Commission, nor the courts may consider complaints of pain.” Ark. Code Ann. § 11-9-102(16)(A)(ii) (Supp. 2007).

Furthermore, Arkansas Code Annotated section 11-9-102(4)(F)(ii)(a) (Supp. 2007) provides that “[p]ermanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” “[M]ajor cause” is that which is more than half of the cause. Ark. Code Ann. § 11-9-102(14) (Supp. 2007). Conflicting evidence as to whether something is a major cause is a question of fact accorded the Commission. *Swift-Eckrich, Inc., supra*.

One of the primary reasons the Commission found that Pillow was not entitled to additional impairment was because it found that Pillow failed to establish that his compensable injury was the major cause of his current condition. Instead, the Commission found that Pillow “had numerous pre-existing problems,” and cited degenerative findings on the MRIs and sensory neuropathy as examples.

Merely identifying degenerative conditions on objective test results is not sufficient to establish that Pillow failed to prove major cause. It is also necessary to examine other evidence to determine whether these pre-existing conditions were symptomatic prior to the April 2004

accident. In this case, all of the evidence, except for Pillow's testimony that he went to a chiropractor for treatment prior to 1981, demonstrates that Pillow had no prior physical limitations or restrictions. He worked thirty-eight years at Sanyo, twenty years as a firefighter, fifteen years in search and rescue, and fifteen years as a security guard. There is no evidence in the record disputing Pillow and his wife's testimony that, prior to the accident, he was physically able to perform all of his work duties. Further, there is no medical evidence in the record reflecting any medical treatment prior to April 2004. As such, there is a total lack of evidence supporting the Commission's finding that Pillow failed to satisfy the major-cause requirement as it relates to permanent impairment. However, the Commission's error on this issue does not require reversal.

The Commission also found that Pillow failed to prove that the additional impairment issued by Dr. Boals to Pillow's neck and back was supported by objective and measurable findings. The Commission found that only five percent of Dr. Boals's rating to Pillow's neck was based on objective and measurable findings, while the remaining impairment to the neck and back was based on radicular pain in the hands, which is subjective, and degenerative conditions not related to the compensable injury. We hold that this finding is supported by substantial evidence. First, the medical evidence, in the form of a cervical MRI, demonstrated that Pillow suffered a herniated disk at C5-6. However, the lumbar MRI demonstrated degenerative findings in the lumbar region, and Drs. Parker, Braden, and Boals all concurred that those findings were degenerative in nature. Further, the applicable statute specifically states that pain is not to be considered when issuing an impairment rating. Ark. Code Ann.

§ 11-9-102(16)(A)(ii). Therefore, we affirm the Commission's denial of an additional impairment rating beyond the six-percent rating accepted and paid by Sanyo.

Pillow contends that the only evidence in the record that can arguably support the decision of the Commission to deny additional impairment is Dr. Braden's report and that report does not fully support the decision. This argument fails for two reasons. First, Dr. Braden's impairment rating is not at issue in this appeal. Sanyo accepted and paid this rating, and Pillow did not argue below that it was issued incorrectly. Second, it is the duty of the Commission to weigh the medical evidence, and the Commission has the authority to accept or reject medical opinions—its resolution of the medical evidence has the force and effect of a jury verdict. *Jones v. Wal-Mart Stores, Inc.*, 100 Ark. App. 17, ___ S.W.3d ___ (2007).

In reversing the ALJ, the Commission also found that Pillow was not entitled to permanent total disability or wage loss benefits. The Commission based its decision on its findings that: Drs. Braden and Schwartz released Pillow to return to work without restrictions; Sanyo made a bona fide offer of employment to Pillow (with an increased salary) that he rejected; he suffered a six-percent impairment rating; he failed to return to work based upon his own self-limiting behavior and subjective complaints; he is literate and received extensive training in firefighting and search and rescue; he has engaged various job activities (paid, volunteer, and hobby); he is receiving social security disability benefits; and he lacked motivation to return to work

Pillow argues that there is a lack of substantial evidence supporting this decision. He argues that the Commission relied heavily on the "flawed" opinions of Dr. Braden and

rejected the opinions of Dr. Boals. Pillow also argues that the Commission failed to consider Dr. Boals's rating for the back injury on the basis that it was not related to the compensable injury. He contends that Drs. Parker and Boals released Pillow to work with restrictions, which, at a minimum, would entitle him to wage loss. He further argues that the more recent opinions of Dr. Schwartz were that Pillow would not be able to return to work. Pillow notes that the vocational specialist concluded that Pillow could not work at any level and was unemployable due to his age, education, and work history and that the Commission arbitrarily disregarded this opinion. Finally, Pillow argues that there was no bona fide offer of employment by Sanyo because the job was not within the physical restrictions imposed on him by Drs. Parker and Boals, and by the vocational specialist.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he sustained permanent physical impairment as a result of a compensable injury. *Id.* In the instant case, Sanyo accepted and paid a six-percent rating.

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. Ark. Code Ann. § 11-9-522 (Repl. 2002); *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). In considering claims for permanent partial disability benefits in excess of the

employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the medical evidence, the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. § 11-9-522(b)(1); *Lee, supra*. In considering factors that may affect an employee's future earning capacity, we may also consider the claimant's motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to the full assessment of wage loss. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

If an employee, subsequent to his injury, has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. § 11-9-522(b)(2). The employer or his workers' compensation insurance carrier has the burden of proving a bona fide job offer. Ark. Code Ann. § 11-9-522(c)(1) (Repl. 2002). Further, Arkansas Code Annotated section 11-9-526 (Repl. 2002) makes it clear:

If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of his refusal, unless in the eyes of the Workers' Compensation Commission, the refusal is justifiable.

On the issue of whether Pillow is able to work, the Commission relied heavily on the report of Dr. Braden, who returned Pillow to work without restrictions. However, Dr. Braden's report is not the only medical report that reached the conclusion that Pillow could return to work without restrictions. Dr. Schwartz, in his October 20, 2005 report, also released Pillow to return to work without any restrictions. Further, other medical evidence demonstrates that Pillow can work at less than full duty. For example, the FCE evaluator concluded that at a minimum, Pillow could return to work at sedentary duty. Dr. Parker agreed with that assessment. Finally, the medical evidence is clear that Pillow is not a surgical candidate and that he has been released by all of his physicians from active medical care. His only medical treatment is prescription medication, and no doctor has opined that Pillow cannot work due to those medications.

Pillow correctly points out that Dr. Boals and Mr. White concluded that Pillow could not return to work without restrictions and that Dr. Schwartz more recently restricted Pillow's work. Clearly, these opinions conflict with those of Dr. Braden and Dr. Parker, and Dr. Schwartz's early opinions. Again, it is the duty of the Commission to weigh the medical evidence, and the Commission has the authority to accept or reject medical opinions—its resolution of the medical evidence has the force and effect of a jury verdict. Therefore, we hold that substantial evidence supports the Commission's decision that Pillow is not entitled to permanent benefits beyond his impairment rating.

We further hold that substantial evidence supports the Commission's decision that Sanyo met its burden of showing that it made a bona fide offer of employment to Pillow. The

record contains correspondence to Pillow, which he acknowledged he received after he was released by Dr. Braden, advising that Sanyo had Pillow's job available (now at a higher rate of pay). Sanyo's human-resource specialist testified that based upon the release of Dr. Braden, the job was appropriate for Pillow. While Pillow testified that he could not perform that job because of his physical condition and the effects of his medication, there was substantial medical evidence (described above) that contradicted his testimony. Therefore, we hold that substantial evidence supports the Commission's finding that Pillow's refusal of the job offered by Sanyo was unjustified.³

Affirmed.

GLOVER and BAKER, JJ., agree.

³The Commission found a lack of major-cause evidence supporting an award of wage loss and/or permanent total disability benefits because Pillow "had numerous pre-existing problems." For the same reasons outlined above, we disagree. However, the Commission's erroneous finding does not warrant reversal because Pillow failed to establish that he was not able to work and that he was justified in refusing a bona-fide job offer.